



FEDERAL ELECTION COMMISSION
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Alan P Dye, Esq
Heidi K Abegg, Esq
Webster, Chamberlain & Bean
1747 Pennsylvania Avenue, N W
Washington, DC 20006

RE MUR 5572
David W Rogers,
Friends of Dave Rogers,
Rogers for Congress n/k/a Special
Operations Fund, and
Christian Winthrop, in his official
capacity as treasurer for both
committees

Dear Mr Dye and Ms Abegg

Based on a complaint filed with the Federal Election Commission on October 18, 2004, and information supplied by your clients, the Commission, on August 17, 2006, found that there was reason to believe your clients, David W Rogers, Friends of Dave Rogers, Rogers for Congress n/k/a Special Operations Fund, and Christian Winthrop, in his official capacity as treasurer for both committees, violated 2 U S C § 439a, and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred

The Commission may or may not approve the General Counsel's recommendations Submitted for your review are briefs stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission briefs (ten copies if possible) stating your position on the issues and replying to the briefs of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible) The General Counsel's briefs and any briefs that you may submit will be considered by the Commission before proceeding to a vote on whether there is probable cause to believe a violation has occurred

If you are unable to file responsive briefs within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing

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Alan P Dye, Esq
Heidi K. Abegg, Esq
MUR 5572
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five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed. Reg. 7551 (Feb. 16, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Audra Wasson, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Thomasenia P. Duncan
General Counsel

Enclosures

- Brief – David W. Rogers
- Brief – Friends of Dave Rogers and
Christian Winthrop, in his official
capacity as treasurer
- Brief – Rogers for Congress n/k/a Special
Special Operations Fund and Christian
Winthrop, in his official capacity as
treasurer

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

David W Rogers

MUR 5572

GENERAL COUNSEL'S BRIEF

I. INTRODUCTION

This matter arose from a complaint filed with the Federal Election Commission ("the Commission"), alleging that David W Rogers, the Republican candidate for Congress in Rhode Island's First Congressional District in the 2002 and 2004 general elections, and his 2002 and 2004 campaign committees, Friends of Dave Rogers and Rogers for Congress, and Christian Winthrop, in his official capacity as treasurer for both committees, referred to collectively hereinafter as "the Respondents," violated 2 U S C § 439a and 11 C F R § 113.1 when Rogers converted committee assets (in the form of contributor mailing lists developed by his campaign committees with the use of campaign funds) to personal use by selling or renting the contributor lists and retaining the proceeds from that sale for personal use.

After considering the complaint, the Respondents' response, and publicly available information, the Commission found reason to believe that Respondents violated 2 U S C § 439a and 11 C F R § 113.1. See Factual and Legal Analysis. Rogers submitted a response to the Commission's factual and legal analysis, through counsel, in which he admitted to selling the contributor lists developed by his committees and retaining the proceeds for his own personal use. Rogers claimed, however, that the Commission's regulations "contain no specific provision prohibiting the conversion to personal use of a mailing list." Response dated Oct. 23, 2006. Rogers also claims that a Memorandum of Understanding with his campaign committees granted

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him co-ownership of the mailing list Rogers, however, did not provide the committees with any significant consideration, much less fair market value, for his purported co-ownership of the list

The Commission's investigation confirmed that Rogers sold a mailing list developed almost entirely with his campaign committees' assets and retained 100% of the proceeds for his own personal use Therefore, the Office of General Counsel is prepared to recommend that the Commission find probable cause to believe that David W Rogers violated 2 U S C § 439a and 11 C F R § 113.1

II. SUMMARY OF THE RECORD

A. Background

David W Rogers was the Republican candidate for Congress in Rhode Island's First Congressional District in the 2002 and 2004 general elections Friends of Dave Rogers was the principal campaign committee for David Rogers' 2002 campaign for Congress Rogers for Congress was the principal campaign committee for David Rogers' 2004 campaign for Congress

During the 2004 election cycle, Rogers took a salary from his campaign¹ Rogers Tr at 27-28 In addition to the salary payments received from his campaign committee, Rogers' U S House of Representatives Financial Disclosure Statement, filed on July 17, 2004, revealed \$44,000 in "salary" income received in 2003 and \$28,000 in "salary" income received during the

¹ Based on reports filed by Rogers for Congress, Rogers took a total of \$10,022.63 in salary payments from his committee for the 2004 election cycle, although Rogers stated in his deposition that he believed he took a salary equivalent to \$40,000 a year during the 2004 campaign Rogers Tr at 28 Rogers was not always sure about his memory of events, so it is unclear whether he actually took a salary of around \$40,000 that his committee failed to report or whether the salary was accurately reported and his memory was simply faulty on that point

Rogers did not take a salary from his campaign during the 2002 election cycle In 1999, the Commission issued an Advisory Opinion holding that campaign funds could not be used to pay candidate salaries without violating 2 U S C § 439a Advisory Opinion 1999-1 The Commission superseded Advisory Opinion 1999-1 in a 2002 rulemaking, which sets forth rules under which a candidate's principal campaign committee may pay a salary to the candidate See Explanation & Justification for 11 C F R § 113.1(g)(1)(i) ("E&J"), 67 Fed Reg 76971 (Dec 13, 2002)

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1 first half of 2004 from BMW Lists, LLLP ("BMW Lists")² The payments Rogers received from
2 BMW Lists were apparently separate from the salary he took from his campaign and were not
3 reported by his principal campaign committee as salary paid to the candidate Although Rogers
4 reported a total of \$72,000 received from BMW Lists on his House Financial Disclosure
5 Statement, the investigation only uncovered records of payments in the amount of \$56,000 from
6 BMW Lists to Rogers See Attachment 1 (List of Payments from BMW Lists to Rogers)
7 Rogers stated that he may have received additional amounts from other sources for selling or
8 renting his list, but he does not remember and has no evidence one way or the other Rogers Tr
9 at 64-65

10 **B. Development of the Mailing List**

11 After Rogers decided to become a candidate in early 2001, he developed an initial list of
12 names including people he knew in Rhode Island, from the Navy, from his college fraternity,
13 friends of his parents, *etcetera*, and provided that list to his campaign committee without
14 claiming any ownership interest in the list Rogers Tr at 31 Rogers estimated that the initial list
15 that he generated from his personal contacts contained between 500 and 1,000 names³ He did
16 not expend any funds in developing that initial list Rogers Tr at 32-33

17 Rogers' first principal campaign committee, Friends of Dave Rogers, continued
18 development of the initial mailing list around the beginning of his 2002 campaign According to
19 Rogers, the campaign committee contracted with Bruce Eberle & Associates for an initial test
20 mailing to determine how much money could be raised for Rogers Rogers Tr at 37-38 Once

² Although Rogers characterized the payments from BMW Lists as "salary" on his Financial Disclosure Statement, he was not an employee of BMW Lists (see Rogers Tr at 9-13) and the payments appear to have been for the purchase of his committees' mailing list Those were the only items reported on his Financial Disclosure Statement He did not report the salary from his campaign committee on his Financial Disclosure Statement

³ Rogers has no means with which to document the exact number of names he provided to his committees

1 that initial test mailing generated sufficient contribution income to be deemed successful,⁴ it
2 appears that Bruce Eberle & Associates became Rogers' first direct mail vendor, and Friends of
3 Dave Rogers paid the vendor for the list developed as a result of the initial test mailing and
4 subsequent mailings Rogers Tr at 39 Rogers also indicated that his committees paid to
5 purchase or rent various other donor lists for use in direct mailings, and that the contributions
6 received in response to those direct mailings generated additional names for the master list that
7 he eventually sold to BMW Lists⁵ Rogers Tr at 40-43 In addition to the lists his committees
8 rented and purchased, Rogers confirmed that campaign volunteers for his committees helped to
9 develop a mailing list that also went into the final master list Rogers Tr at 41 Thus, the master
10 list of the committees appears to have included the relatively small number of names that Rogers
11 initially contributed to his committees (500 to 1,000) plus potentially in excess of 20,000 names
12 that his committees developed by purchasing or renting other mailing lists and by the work of
13 campaign volunteers⁶ The Rogers Committees collectively spent approximately \$211,648 20 to
14 develop mailing lists during the 2002 and 2004 elections The committees' disclosure reports
15 described these expenses as "list acquisition," "mailing list," "lists," and "list services"⁷ The

⁴ As Rogers described it, the test mailer, which was sent to approximately 25,000 people, would be considered "successful" if "it made money if it didn't lose that much money if you are able to get 80 cents on the dollar, 70, something like that, then it looks like you may have a viable situation" Rogers Tr at 38

⁵ It appears to be the general practice in the mailing list and direct mail industry for a committee that rents a mailing list to have the right to retain ownership of any names generated by responses to the mailing sent using the rented list

⁶ BMW Lists was unable to provide specific information regarding the number of names on the list it purchased from Rogers

⁷ Friends of Dave Rogers (the 2002 campaign committee) spent \$173,306 34 for "lists" and "list services" Rogers for Congress (the 2004 campaign committee) spent \$38,341 86 for "list acquisition" and "mailing list" This amount does not include expenditures made for "direct mail," "direct mail creatives," "direct mail production," "direct mail caging," "direct mail printing," "mail," or "mail services" With all of those categories included, the total Rogers' committees spent for direct mail and mailing list related items was approximately \$1,310,419 06

1 "master list" Rogers eventually sold to BMW Lists contained in excess of 20,000 names. Rogers

2 Tr. at 48 and 37

3 On October 1, 2001, David Rogers and Christian Winthrop, on behalf of Friends of Dave
4 Rogers, signed a Memorandum of Understanding ("MOU") that purports to create co-ownership
5 rights in the campaign donor lists developed by Rogers and Friends of Dave Rogers.⁸ The MOU
6 simply states that "in consideration of his personal contributions to the creation of such lists, his
7 signature on all fundraising letters, and his life story which is contained in these solicitations,"
8 Friends of Dave Rogers and David Rogers shall co-own "all names generated as the result of any
9 direct mail solicitation." See Attachment 2. It is unclear who may have drafted the MOU. It is
10 Rogers' recollection that Christian Winthrop, the treasurer of Friends of Dave Rogers, presented
11 him with the MOU, but Rogers does not recall if he instructed Winthrop to sign the MOU, or if it
12 was the other way around. Rogers Tr. at 52-53. Rogers indicated that he may have believed
13 such a co-ownership interest was permissible from conversations with Patrick Mooney, who was
14 at that time a direct mail fundraising agent for Bruce Eberle & Associates (a vendor for Friends
15 of Dave Rogers). Rogers Tr. at 25-26. Mooney later became a principal in BMW Lists, the
16 company to which Rogers sold his campaigns' master list.

17 Other than the initial list of less than a thousand names, however, the only consideration
18 Rogers provided to his campaign committee in return for an ownership interest in the final
19 master list was the use of his name, likeness, and life story, as well as the occasional
20 proofreading of fundraising letters. Rogers Tr. at 48 and 70. Rogers also stated that he was not

⁸ Respondents did not submit a similar MOU between David Rogers and Rogers for Congress, the 2004 committee. The investigation revealed that apparently no similar MOU existed with Rogers for Congress, although the parties appear to have treated the 2004 committee as simply an extension of the 2002 committee. Rogers Tr. at 51.

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1 even "certain that what was sold to BMW Lists had anything to do with, one way or the other
2 with [sic] what [he] did initially " Rogers Tr at 52

3 **C. Sale of the Mailing List**

4 In the spring of 2003, Rogers signed a Contract for Purchase of List Property with BMW
5 Lists.⁹ See Attachment 3 (Contract for Purchase of List Property) Under this contract, BMW
6 Lists purchased "the donor list of all direct mail generated supporters of Dave Roger's [sic]
7 campaign for U S Congress, from October 1, 2002 to April 30, 2003 " *Id* The price of
8 purchase was \$48,000, and according to the contract, "payment of this \$48,000 fee shall be made
9 to Dave Rogers in 24 installments of \$2,000 each " *Id* On May 28, 2003, a handwritten
10 addendum was added to the contract extending the terms of the contract, including additional
11 payments of \$8,000, to July 15, 2003 *Id* The contract makes no mention of the MOU or the
12 committees' ownership interest in the list

13 Rogers' memory was not clear surrounding the details of the contract, however, he stated
14 that he believed someone at BMW Lists approached him with the offer to buy the mailing list
15 Rogers stated that he believed he spoke with Patrick Mooney and Robert Dubiel about the
16 contract and about his ownership interest in the mailing list, but he did not remember any details
17 of those conversations Rogers Tr at 54-57 Rogers does not recall anyone at BMW Lists
18 questioning the legality of his ownership interest in the list at the time of the contract, but did
19 think that questions were raised at a later date Rogers Tr at 54-55 According to Robert
20 Dubiel, who was President of BMW Lists at the time of the contract, he had questioned Patrick
21 Mooney, who was the managing partner of BMW Lists at the time, about "the legality of the

⁹ Robert Dubiel, President of BMW Lists, signed the contract on April 20, 2003, but Rogers did not sign the contract until May 31, 2003

1 agreement, because he thought it was odd that the candidate and not the committee was the

2 purported owner " See Response to Questions Related to MUR 5572 from BMW Lists, July 11,
3 2007

4 According to a list of payments made to Rogers by BMW Lists, Rogers was paid \$56,000
5 for the purchase of his committees' mailing list See Attachment 1 (List of Payments from
6 BMW Lists to Rogers) Rogers stated that to the best of his recollection the list provided by
7 BMW Lists was a complete listing of the payments made to him for the purchase of the mailing
8 list Rogers Tr at 64 He also stated that he retained one hundred percent of the proceeds for his
9 own personal use (e g , to pay a mortgage, private school bills for his children, and other living
10 expenses) Rogers Tr at 64-66 When asked whether he received any additional income at any
11 time from any other source for the sale or rental of his committees' mailing list, Rogers indicated
12 that he thought he might have but did not remember from whom or the amount Rogers Tr at
13 64-65

14 **III. ANALYSIS**

15 It is undisputed that David W Rogers sold a mailing list developed almost entirely by his
16 campaign committees using contributions received pursuant to the Federal Election Campaign
17 Act of 1971, as amended, ("the Act") and retained the proceeds from the sale for his own
18 personal use The Act states that a "contribution accepted by a candidate" "shall not be
19 converted by any person to personal use " 2 U S C § 439a(b)(1) "A contribution or donation
20 shall be considered to be converted to personal use if the contribution or amount is used to fulfill
21 any commitment, obligation, or expense of a person that would exist irrespective of the
22 candidate's election campaign " 2 U S C § 439a(b)(2) The Commission's regulations state that

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1 "the Commission will determine, on a case-by-case basis whether uses of funds in a campaign
2 account" constitute "personal use " 11 C F R § 113 1(g)(1)(ii) The regulations then state that
3 "the transfer of a campaign committee asset is not personal use so long as the transfer is for *fair*
4 *market value* " 11 C F R § 113 1(g)(3) (emphasis added)

5 According to documents and sworn testimony, Rogers sold his campaign committees'
6 master mailing list to BMW Lists for at least \$56,000 in profit, which he retained for his own
7 personal use (to pay the mortgage, his children's private school bills, and living expenses)
8 Rogers Tr at 64-66 Furthermore, the mailing list that he sold was apparently developed by his
9 campaign committees using contributions made to his committees ¹⁰

10 The fact that Rogers and Friends of Dave Rogers entered into a Memorandum of
11 Understanding purporting to grant Rogers a co-ownership interest in the list does not change the
12 analysis Neither the Act nor the Commission's regulations allow parties to contract around the
13 personal use provisions

14 Although it is conceivable that a candidate could enter into a contract with his principal
15 campaign committee to obtain some asset or portion of an asset belonging to his campaign
16 committee (or developed using contributions to his campaign committee) by providing
17 something of value to his committee (money, physical equipment, etc) in a fair market
18 exchange, there was no fair market exchange in this case Despite the MOU that Rogers signed
19 with his first principal campaign committee, there is no basis on which to conclude that the
20 transfer of the committee asset (the mailing list) to Rogers was made for fair market value It

¹⁰ Mr Rogers only contributed an initial list of between 500 and 1,000 names to the development of the mailing list, which appears to have ultimately included in excess of 20,000 names Rogers Tr at 48 The Committees developed the bulk of the mailing list by purchasing lists, renting lists for direct mail purposes and adding the names of people who responded to the direct mail to the master mailing list, and using campaign volunteers to help develop the list further Rogers Tr at 39-41

1 does not appear that Rogers' committees received anything in exchange for the transfer. The
2 MOU stated that the consideration was "his personal contributions to the creation of such lists,
3 his signature on all fundraising letters, and his life story." Attachment 2. Rogers' principal
4 campaign committees already had the right to use the candidate's name or likeness on a
5 fundraising solicitation. In fact, Rogers agrees that it would have been impossible for him to run
6 for Congress without providing his committees with his name, likeness, and life story and admits
7 that he provided these things prior to and without any thought of claiming an ownership interest
8 in his committees' mailing list. Rogers Tr. at 31.

9 The relatively few names Rogers initially provided to his 2002 committee in comparison
10 with the apparent size of the final list that he sold to BMW Lists, and the fact that his committees
11 spent at least \$211,648.20 to develop the mailing lists, would not seem to constitute fair market
12 value. In fact, as previously stated, Rogers is not even sure if any of the names he initially
13 provided to his committees were part of the final list that he sold. Rogers Tr. at 52. The fact that
14 he provided his committees with his name, likeness, and life story can hardly be considered
15 providing fair market value in exchange for 100% ownership in his committees' mailing lists.¹¹
16 In addition, Rogers' life story does not appear to have any tangible monetary value above the
17 value of any other individual's life story, if that individual decided to run for Congress.¹² Thus,
18 Rogers does not appear to have provided fair market value to his committees in exchange for his
19 ownership interest in the mailing list.

¹¹ Rogers' committees did not report receiving any payments from BMW Lists, and the contract between BMW Lists and Rogers was for the purchase of the mailing list, not a mere rental. Also, Rogers stated that he did not share any portion of the proceeds from the sale with his committees. Rogers Tr. at 64.

¹² When asked, Rogers admitted that he has never been offered money for the rights to a book or movie utilizing his name and life story, has never attempted to sell the rights to his name and life story, and has never been compensated in any way for the use of his name and life story. Rogers Tr. at 14.

Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe that David W Rogers violated 2 U S C § 439a and 11 CFR § 113.1

IV. GENERAL COUNSEL'S RECOMMENDATION

- 1 Find probable cause to believe that David W Rogers violated 2 U S C § 439a and
11 CFR § 113.1

12/21/2007
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

Kathleen Guith
Kathleen Guith
Acting Deputy Associate General Counsel
for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Audra L. Wassom
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Attorney

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

**Friends of Dave Rogers and Christian
Winthrop, in his official capacity as
treasurer**

MUR 5572

GENERAL COUNSEL'S BRIEF

I. INTRODUCTION

This matter arose from a complaint filed with the Federal Election Commission ("the Commission"), alleging that David W Rogers, the Republican candidate for Congress in Rhode Island's First Congressional District in the 2002 and 2004 general elections, and his 2002 and 2004 campaign committees, Friends of Dave Rogers and Rogers for Congress, and Christian Winthrop, in his official capacity as treasurer for both committees, referred to collectively hereinafter as "the Respondents," violated 2 U S C § 439a and 11 C F R § 113 1 when committee assets (in the form of contributor mailing lists developed with the use of campaign funds) were converted to Rogers' personal use

After considering the complaint, the response, and publicly available information, the Commission found reason to believe that Respondents violated 2 U S C § 439a and 11 C F R § 113 1 See Factual and Legal Analysis Respondents submitted a response to the Commission's factual and legal analysis, through counsel, in which Rogers admitted to selling the contributor lists developed by his committees and retaining the proceeds for his own personal use and the committees acknowledged consenting to the transaction Rogers claimed, however, that the Commission's regulations "contain no specific provision prohibiting the conversion to personal use of a mailing list " Response dated Oct 23, 2006 Rogers also claims that a Memorandum of Understanding with his campaign committees granted him co-ownership of the

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mailing list Rogers, however, did not provide the committees with any significant

consideration, much less fair market value, for his purported co-ownership of the list

The Commission's investigation confirmed that the committees consented to Rogers

retaining, for his own personal use, 100% of the proceeds from the sale of the mailing list

developed almost entirely with his campaign committees' assets Therefore, the Office of

General Counsel is prepared to recommend that the Commission find probable cause to believe

that Friends of Dave Rogers and Christian Winthrop, in his official capacity as treasurer, violated

2 U S C § 439a and 11 C F R § 113.1

II. SUMMARY OF THE RECORD

A. Background

David W. Rogers was the Republican candidate for Congress in Rhode Island's First

Congressional District in the 2002 and 2004 general elections Friends of Dave Rogers was the

principal campaign committee for David Rogers' 2002 campaign for Congress Rogers for

Congress was the principal campaign committee for David Rogers' 2004 campaign for Congress

During the 2004 election cycle, Rogers took a salary from his campaign.¹ Rogers Tr. at

27-28 In addition to the salary payments received from his campaign committee, Rogers' U.S.

House of Representatives Financial Disclosure Statement, filed on July 17, 2004, revealed

¹ Based on reports filed by Rogers for Congress, Rogers took a total of \$10,022.65 in salary payments from his committee for the 2004 election cycle, although Rogers stated in his deposition that he believed he took a salary equivalent to \$40,000 a year during the 2004 campaign Rogers Tr. at 28 Rogers was not always sure about his memory of events, so it is unclear whether he actually took a salary of around \$40,000 that his committee failed to report or whether the salary was accurately reported and his memory was simply faulty on that point.

Rogers did not take a salary from his campaign during the 2002 election cycle In 1999, the Commission issued an Advisory Opinion holding that campaign funds could not be used to pay candidate salaries without violating 2 U S C § 439a Advisory Opinion 1999-1 The Commission superseded Advisory Opinion 1999-1 in a 2002 rulemaking, which sets forth rules under which a candidate's principal campaign committee may pay a salary to the candidate See Explanation & Justification for 11 C F R § 113.1(g)(1)(i)(I) ("E&J"), 67 Fed. Reg. 76971 (Dec. 13, 2002).

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2 first half of 2004 from BMW Lists, LLLP ("BMW Lists")² The payments Rogers received from
3 BMW Lists were apparently separate from the salary he took from his campaign and were not
4 reported by his principal campaign committee as salary paid to the candidate Although Rogers
5 reported a total of \$72,000 received from BMW Lists on his House Financial Disclosure
6 Statement, the investigation only uncovered records of payments in the amount of \$56,000 from
7 BMW Lists to Rogers See Attachment 1 (List of Payments from BMW Lists to Rogers)
8 Rogers stated that he may have received additional amounts from other sources for selling or
9 renting his list, but he does not remember and has no evidence one way or the other Rogers Tr
10 at 64-65

11 B. Development of the Mailing List

12 After Rogers decided to become a candidate in early 2001, he developed an initial list of
13 names including people he knew in Rhode Island, from the Navy, from his college fraternity,
14 friends of his parents, *etcetera*, and provided that list to his campaign committee without
15 claiming any ownership interest in the list Rogers Tr at 31 Rogers estimated that the initial list
16 that he generated from his personal contacts contained between 500 and 1,000 names³ He did
17 not expend any funds in developing that initial list Rogers Tr at 32-33

18 Rogers' first principal campaign committee, Friends of Dave Rogers, continued
19 development of the initial mailing list around the beginning of his 2002 campaign According to

² Although Rogers characterized the payments from BMW Lists as "salary" on his Financial Disclosure Statement, he was not an employee of BMW Lists (see Rogers Tr at 9-13) and the payments appear to have been for the purchase of his committees' mailing list Those were the only items reported on his Financial Disclosure Statement He did not report the salary from his campaign committee on his Financial Disclosure Statement

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1 Rogers, the campaign committee contracted with Bruce Eberle & Associates for an initial test
2 mailing to determine how much money could be raised for Rogers Rogers Tr at 37-38 Once
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4 appears that Bruce Eberle & Associates became Rogers' first direct mail vendor, and Friends of
5 Dave Rogers paid the vendor for the list developed as a result of the initial test mailing and
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10 rented and purchased, Rogers confirmed that campaign volunteers for his committees helped to
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12 list of the committees appears to have included the relatively small number of names that Rogers
13 initially contributed to his committees (500 to 1,000) plus potentially in excess of 20,000 names
14 that his committees developed by purchasing or renting other mailing lists and by the work of
15 campaign volunteers⁶ The Rogers Committees collectively spent approximately \$211,648 20 to
16 develop mailing lists during the 2002 and 2004 elections The committees' disclosure reports

⁴ As Rogers described it, the test mailer, which was sent to approximately 25,000 people, would be considered "successful" if "it made money if it didn't lose that much money if you are able to get 80 cents on the dollar, 70, something like that, then it looks like you may have a viable situation" Rogers Tr at 38

⁵ It appears to be the general practice in the mailing list and direct mail industry for a committee that rents a mailing list to have the right to retain ownership of any names generated by responses to the mailing sent using the rented list

⁶ BMW Lists was unable to provide specific information regarding the number of names on the list it purchased from Rogers

1 described these expenses as "list acquisition," "mailing list," "lists," and "list services"⁷ The
2 "master list" Rogers eventually sold to BMW Lists contained in excess of 20,000 names Rogers
3 Tr at 48 and 37

4 On October 1, 2001, David Rogers and Christian Winthrop, on behalf of Friends of Dave
5 Rogers, signed a Memorandum of Understanding ("MOU") that purports to create co-ownership
6 rights in the campaign donor lists developed by Rogers and Friends of Dave Rogers⁸ The MOU
7 simply states that "in consideration of his personal contributions to the creation of such lists, his
8 signature on all fundraising letters, and his life story which is contained in these solicitations,"
9 Friends of Dave Rogers and David Rogers shall co-own "all names generated as the result of any
10 direct mail solicitation " See Attachment 2 It is unclear who may have drafted the MOU It is
11 Rogers' recollection that Christian Winthrop, the treasurer of Friends of Dave Rogers, presented
12 him with the MOU, but Rogers does not recall if he instructed Winthrop to sign the MOU, or if it
13 was the other way around Rogers Tr at 52-53 Rogers indicated that he may have believed
14 such a co-ownership interest was permissible from conversations with Patrick Mooney, who was
15 at that time a direct mail fundraising agent for Bruce Eberle & Associates (a vendor for Friends
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17 company to which Rogers sold his campaigns' master list

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⁸ Respondents did not submit a similar MOU between David Rogers and Rogers for Congress, the 2004 committee The investigation revealed that apparently no similar MOU existed with Rogers for Congress, although the parties appear to have treated the 2004 committee as simply an extension of the 2002 committee Rogers Tr at 51

1 Other than the initial list of less than a thousand names, however, the only consideration

2 Rogers provided to his campaign committee in return for an ownership interest in the final
3 master list was the use of his name, likeness, and life story, as well as the occasional
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5 even "certain that what was sold to BMW Lists had anything to do with, one way or the other
6 with [sic] what [he] did initially " Rogers Tr at 52

7 C. Sale of the Mailing List

8 In the spring of 2003, Rogers signed a Contract for Purchase of List Property with BMW
9 Lists⁹ See Attachment 3 (Contract for Purchase of List Property) Under this contract, BMW
10 Lists purchased "the donor list of all direct mail generated supporters of Dave Roger's [sic]
11 campaign for U S Congress, from October 1, 2002 to April 30, 2003 " Id The price of
12 purchase was \$48,000, and according to the contract, "payment of this \$48,000 fee shall be made
13 to Dave Rogers in 24 installments of \$2,000 each " Id On May 28, 2003, a handwritten
14 addendum was added to the contract extending the terms of the contract, including additional
15 payments of \$8,000, to July 15, 2003 Id The contract makes no mention of the MOU or the
16 committees' ownership interest in the list

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18 that he believed someone at BMW Lists approached him with the offer to buy the mailing list
19 Rogers stated that he believed he spoke with Patrick Mooney and Robert Dubiel about the
20 contract and about his ownership interest in the mailing list, but he did not remember any details
21 of those conversations Rogers Tr at 54-57 Rogers does not recall anyone at BMW Lists

⁹ Robert Dubiel, President of BMW Lists, signed the contract on April 20, 2003, but Rogers did not sign the contract until May 31, 2003

1 questioning the legality of his ownership interest in the list at the time of the contract, but did
2 think that questions were raised at a later date Rogers Tr at 54-55 According to Robert
3 Dubiel, who was President of BMW Lists at the time of the contract, he had questioned Patrick
4 Mooney, who was the managing partner of BMW Lists at the time, about "the legality of the
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6 purported owner " See Response to Questions Related to MUR 5572 from BMW Lists, July 11,
7 2007

8 According to a list of payments made to Rogers by BMW Lists, Rogers was paid \$56,000
9 for the purchase of his committees' mailing list See Attachment 1 (List of Payments from
10 BMW Lists to Rogers) Rogers stated that to the best of his recollection the list provided by
11 BMW Lists was a complete listing of the payments made to him for the purchase of the mailing
12 list Rogers Tr at 64 He also stated that he retained one hundred percent of the proceeds for his
13 own personal use (e g , to pay a mortgage, private school bills for his children, and other living
14 expenses) Rogers Tr at 64-66 When asked whether he received any additional income at any
15 time from any other source for the sale or rental of his committees' mailing list, Rogers indicated
16 that he thought he might have but did not remember from whom or the amount Rogers Tr at
17 64-65

18 III. ANALYSIS

19 It is undisputed that David W Rogers sold a mailing list developed almost entirely by his
20 campaign committees using contributions received pursuant to the Federal Election Campaign
21 Act of 1971, as amended, ("the Act") and retained the proceeds from the sale for his own
22 personal use The Act states that a "contribution accepted by a candidate" "shall not be

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converted by any person to personal use " 2 U S C § 439a(b)(1) "A contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign " 2 U S C § 439a(b)(2) The Commission's regulations state that "the Commission will determine, on a case-by-case basis whether uses of funds in a campaign account" constitute "personal use " 11 C F R § 113 1(g)(1)(u) The regulations then state that "the transfer of a campaign committee asset is not personal use so long as the transfer is for *fair market value* " 11 C F R § 113 1(g)(3) (emphasis added)

According to documents and sworn testimony, Rogers sold his campaign committees' master mailing list to BMW Lists for at least \$56,000 in profit, which he retained for his own personal use (to pay the mortgage, his children's private school bills, and living expenses) Rogers Tr at 64-66 Furthermore, the mailing list that he sold was apparently developed by his campaign committees using contributions made to his committees ¹⁰ Christian Winthrop, on behalf of the committees, apparently consented to this transaction by signing the Memorandum of Understanding giving Rogers co-ownership rights in the list without a fair market value exchange

The fact that Rogers and Friends of Dave Rogers entered into a Memorandum of Understanding purporting to grant Rogers a co-ownership interest in the list does not change the analysis It merely makes the committees complicit in the violation of the Act's personal use

¹⁰ Mr Rogers only contributed an initial list of between 500 and 1,000 names to the development of the mailing list, which appears to have ultimately included in excess of 20,000 names Rogers Tr at 48 The Committees developed the bulk of the mailing list by purchasing lists, renting lists for direct mail purposes and adding the names of people who responded to the direct mail to the master mailing list, and using campaign volunteers to help develop the list further Rogers Tr at 39-41

1 provisions Neither the Act nor the Commission's regulations allow parties to contract around
2 the personal use provisions

3 Although it is conceivable that a candidate could enter into a contract with his principal
4 campaign committee to obtain some asset or portion of an asset belonging to his campaign
5 committee (or developed using contributions to his campaign committee) by providing
6 something of value to his committee (money, physical equipment, etc) in a fair market
7 exchange, there was no fair market exchange in this case Despite the MOU that Rogers signed
8 with his first principal campaign committee, there is no basis on which to conclude that the
9 transfer of the committee asset (the mailing list) to Rogers was made for fair market value It
10 does not appear that Rogers' committees received anything in exchange for the transfer The
11 MOU stated that the consideration was "his personal contributions to the creation of such lists,
12 his signature on all fundraising letters, and his life story" Attachment 2 Rogers' principal
13 campaign committees already had the right to use the candidate's name or likeness on a
14 fundraising solicitation In fact, Rogers agrees that it would have been impossible for him to run
15 for Congress without providing his committees with his name, likeness, and life story and admits
16 that he provided these things prior to and without any thought of claiming an ownership interest
17 in his committees' mailing list Rogers Tr at 31

18 The relatively few names Rogers initially provided to his 2002 committee in comparison
19 with the apparent size of the final list that he sold to BMW Lists, and the fact that his committees
20 spent at least \$211,648 20 to develop the mailing lists, would not seem to constitute fair market
21 value In fact, as previously stated, Rogers is not even sure if any of the names he initially
22 provided to his committees were part of the final list that he sold Rogers Tr at 52 The fact that

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1 he provided his committees with his name, likeness, and life story can hardly be considered
2 providing fair market value in exchange for 100% ownership in his committees' mailing lists ¹¹
3 In addition, Rogers' life story does not appear to have any tangible monetary value above the
4 value of any other individual's life story, if that individual decided to run for Congress ¹² Thus,
5 Rogers does not appear to have provided fair market value to his committees in exchange for his
6 ownership interest in the mailing list

7 Accordingly, this Office is prepared to recommend that the Commission find probable
8 cause to believe that Friends of Dave Rogers and Christian Winthrop, in his official capacity as
9 treasurer, violated 2 U S C § 439a and 11 C F R § 113.1

IV. GENERAL COUNSEL'S RECOMMENDATION

1 Find probable cause to believe that Friends of Dave Rogers and Christian Winthrop,
in his official capacity as treasurer, violated 2 U S C § 439a and 11 C F R § 113.1

10 12/21/2007
11 Date

Thomasena P. Duncan
Thomasena P. Duncan
General Counsel

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17 Kathleen Gunth
Kathleen Gunth
Acting Deputy Associate General Counsel
for Enforcement

¹¹ Rogers' committees did not report receiving any payments from BMW Lists, and the contract between BMW Lists and Rogers was for the purchase of the mailing list, not a mere rental. Also, Rogers stated that he did not share any portion of the proceeds from the sale with his committees. Rogers Tr. at 64.

¹² When asked, Rogers admitted that he has never been offered money for the rights to a book or movie utilizing his name and life story, has never attempted to sell the rights to his name and life story, and has never been compensated in any way for the use of his name and life story. Rogers Tr. at 14.



Mark Shonkwiler
Assistant General Counsel



Audra L. Wassom
Attorney

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Rogers for Congress n/k/a Special
Operations Fund and Christian Winthrop,
in his official capacity as treasurer

MUR 5572

GENERAL COUNSEL'S BRIEF

I. INTRODUCTION

This matter arose from a complaint filed with the Federal Election Commission ("the Commission"), alleging that David W Rogers, the Republican candidate for Congress in Rhode Island's First Congressional District in the 2002 and 2004 general elections, and his 2002 and 2004 campaign committees, Friends of Dave Rogers and Rogers for Congress n/k/a Special Operations Fund, and Christian Winthrop, in his official capacity as treasurer for both committees, referred to collectively hereinafter as "the Respondents," violated 2 U S C § 439a and 11 C F R § 113.1 when committee assets (in the form of contributor mailing lists developed with the use of campaign funds) were converted to Rogers' personal use.

After considering the complaint, the response, and publicly available information, the Commission found reason to believe that Respondents violated 2 U S C § 439a and 11 C F R § 113.1. See Factual and Legal Analysis. Respondents submitted a response to the Commission's factual and legal analysis, through counsel, in which Rogers admitted to selling the contributor lists developed by his committees and retaining the proceeds for his own personal use and the committees acknowledged consenting to the transaction. Rogers claimed, however, that the Commission's regulations "contain no specific provision prohibiting the conversion to personal use of a mailing list." Response dated Oct. 23, 2006. Rogers also claims that a Memorandum of Understanding with his campaign committees granted him co-ownership of the

General Counsel's Brief
 Rogers for Congress n/k/a Special Operations Fund and
 Christian Winthrop, in his official capacity as treasurer

1 mailing list Rogers, however, did not provide the committees with any significant

2 consideration, much less fair market value, for his purported co-ownership of the list

3 The Commission's investigation confirmed that the committees consented to Rogers

4 retaining, for his own personal use, 100% of the proceeds from the sale of the mailing list

5 developed almost entirely with his campaign committees' assets Therefore, the Office of

6 General Counsel is prepared to recommend that the Commission find probable cause to believe

7 that Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop, in his official

8 capacity as treasurer, violated 2 U S C § 439a and 11 C F R § 113.1

9 II. SUMMARY OF THE RECORD

10 A. Background

11 David W. Rogers was the Republican candidate for Congress in Rhode Island's First

12 Congressional District in the 2002 and 2004 general elections Friends of Dave Rogers was the

13 principal campaign committee for David Rogers' 2002 campaign for Congress Rogers for

14 Congress was the principal campaign committee for David Rogers' 2004 campaign for Congress

15 During the 2004 election cycle, Rogers took a salary from his campaign¹ Rogers Tr at

16 27-28 In addition to the salary payments received from his campaign committee, Rogers' U S

17 House of Representatives Financial Disclosure Statement, filed on July 17, 2004, revealed

¹ Based on reports filed by Rogers for Congress, Rogers took a total of \$10,022.65 in salary payments from his committee for the 2004 election cycle, although Rogers stated in his deposition that he believed he took a salary equivalent to \$40,000 a year during the 2004 campaign Rogers Tr at 28 Rogers was not always sure about his memory of events, so it is unclear whether he actually took a salary of around \$40,000 that his committee failed to report or whether the salary was accurately reported and his memory was simply faulty on that point

Rogers did not take a salary from his campaign during the 2002 election cycle In 1999, the Commission issued an Advisory Opinion holding that campaign funds could not be used to pay candidate salaries without violating 2 U S C § 439a Advisory Opinion 1999-1 The Commission superseded Advisory Opinion 1999-1 in a 2002 rulemaking, which sets forth rules under which a candidate's principal campaign committee may pay a salary to the candidate See Explanation & Justification for 11 C F R § 113.1(g)(1)(i)(I) ("E&J"), 67 Fed Reg 76971 (Dec 13, 2002)

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1 \$44,000 in "salary" income received in 2003 and \$28,000 in "salary" income received during the
2 first half of 2004 from BMW Lists, LLLP ("BMW Lists")² The payments Rogers received from
3 BMW Lists were apparently separate from the salary he took from his campaign and were not
4 reported by his principal campaign committee as salary paid to the candidate Although Rogers
5 reported a total of \$72,000 received from BMW Lists on his House Financial Disclosure
6 Statement, the investigation only uncovered records of payments in the amount of \$56,000 from
7 BMW Lists to Rogers See Attachment 1 (List of Payments from BMW Lists to Rogers)
8 Rogers stated that he may have received additional amounts from other sources for selling or
9 renting his list, but he does not remember and has no evidence one way or the other Rogers Tr
10 at 64-65

11 B. Development of the Mailing List

12 After Rogers decided to become a candidate in early 2001, he developed an initial list of
13 names including people he knew in Rhode Island, from the Navy, from his college fraternity,
14 friends of his parents, *etcetera*, and provided that list to his campaign committee without
15 claiming any ownership interest in the list Rogers Tr at 31 Rogers estimated that the initial list
16 that he generated from his personal contacts contained between 500 and 1,000 names³ He did
17 not expend any funds in developing that initial list Rogers Tr at 32-33

18 Rogers' first principal campaign committee, Friends of Dave Rogers, continued
19 development of the initial mailing list around the beginning of his 2002 campaign According to

² Although Rogers characterized the payments from BMW Lists as "salary" on his Financial Disclosure Statement, he was not an employee of BMW Lists (*see* Rogers Tr at 9-13) and the payments appear to have been for the purchase of his committee's mailing list Those were the only items reported on his Financial Disclosure Statement He did not report the salary from his campaign committee on his Financial Disclosure Statement

³ Rogers has no means with which to document the exact number of names he provided to his committees

1 Rogers, the campaign committee contracted with Bruce Eberle & Associates for an initial test
2 mailing to determine how much money could be raised for Rogers Rogers Tr at 37-38 Once
3 that initial test mailing generated sufficient contribution income to be deemed successful,⁴ it
4 appears that Bruce Eberle & Associates became Rogers' first direct mail vendor, and Friends of
5 Dave Rogers paid the vendor for the list developed as a result of the initial test mailing and
6 subsequent mailings Rogers Tr at 39 Rogers also indicated that his committees paid to
7 purchase or rent various other donor lists for use in direct mailings, and that the contributions
8 received in response to those direct mailings generated additional names for the master list that
9 he eventually sold to BMW Lists⁵ Rogers Tr at 40-43 In addition to the lists his committees
10 rented and purchased, Rogers confirmed that campaign volunteers for his committees helped to
11 develop a mailing list that also went into the final master list Rogers Tr at 41 Thus, the master
12 list of the committees appears to have included the relatively small number of names that Rogers
13 initially contributed to his committees (500 to 1,000) plus potentially in excess of 20,000 names
14 that his committees developed by purchasing or renting other mailing lists and by the work of
15 campaign volunteers⁶ The Rogers Committees collectively spent approximately \$211,648 20 to
16 develop mailing lists during the 2002 and 2004 elections The committees' disclosure reports

⁴ As Rogers described it, the test mailer, which was sent to approximately 25,000 people, would be considered "successful" if "it made money if it didn't lose that much money if you are able to get 80 cents on the dollar, 70, something like that, then it looks like you may have a viable situation" Rogers Tr at 38

⁵ It appears to be the general practice in the mailing list and direct mail industry for a committee that rents a mailing list to have the right to retain ownership of any names generated by responses to the mailing sent using the rented list

⁶ BMW Lists was unable to provide specific information regarding the number of names on the list it purchased from Rogers

1 described these expenses as "list acquisition," "mailing list," "lists," and "list services."⁷ The

2 "master list" Rogers eventually sold to BMW Lists contained in excess of 20,000 names. Rogers
3 Tr. at 48 and 37.

4 On October 1, 2001, David Rogers and Christian Winthrop, on behalf of Friends of Dave
5 Rogers, signed a Memorandum of Understanding ("MOU") that purports to create co-ownership
6 rights in the campaign donor lists developed by Rogers and Friends of Dave Rogers.⁸ The MOU
7 simply states that "in consideration of his personal contributions to the creation of such lists, his
8 signature on all fundraising letters, and his life story which is contained in these solicitations,"
9 Friends of Dave Rogers and David Rogers shall co-own "all names generated as the result of any
10 direct mail solicitation." See Attachment 2. It is unclear who may have drafted the MOU. It is
11 Rogers' recollection that Christian Winthrop, the treasurer of Friends of Dave Rogers, presented
12 him with the MOU, but Rogers does not recall if he instructed Winthrop to sign the MOU, or if it
13 was the other way around. Rogers Tr. at 52-53. Rogers indicated that he may have believed
14 such a co-ownership interest was permissible from conversations with Patrick Mooney, who was
15 at that time a direct mail fundraising agent for Bruce Eberle & Associates (a vendor for Friends
16 of Dave Rogers). Rogers Tr. at 25-26. Mooney later became a principal in BMW Lists, the
17 company to which Rogers sold his campaigns' master list.

⁷ Friends of Dave Rogers (the 2002 campaign committee) spent \$173,306.34 for "lists" and "list services." Rogers for Congress (the 2004 campaign committee) spent \$38,341.86 for "list acquisition" and "mailing list." This amount does not include expenditures made for "direct mail," "direct mail creatives," "direct mail production," "direct mail caging," "direct mail printing," "mail," or "mail services." With all of those categories included, the total Rogers' committee spent for direct mail and mailing list related items was approximately \$1,310,419.06.

⁸ Respondents did not submit a similar MOU between David Rogers and Rogers for Congress, the 2004 committee. The investigation revealed that apparently no similar MOU existed with Rogers for Congress, although the parties appear to have treated the 2004 committee as simply an extension of the 2002 committee. Rogers Tr. at 51.

Other than the initial list of less than a thousand names, however, the only consideration

Rogers provided to his campaign committee in return for an ownership interest in the final master list was the use of his name, likeness, and life story, as well as the occasional proofreading of fundraising letters Rogers Tr at 48 and 70 Rogers also stated that he was not even "certain that what was sold to BMW Lists had anything to do with, one way or the other with [sic] what [he] did initially " Rogers Tr at 52

C. Sale of the Mailing List

In the spring of 2003, Rogers signed a Contract for Purchase of List Property with BMW Lists⁹ See Attachment 3 (Contract for Purchase of List Property) Under this contract, BMW Lists purchased "the donor list of all direct mail generated supporters of Dave Roger's [sic] campaign for U S Congress, from October 1, 2002 to April 30, 2003 " *Id* The price of purchase was \$48,000, and according to the contract, "payment of this \$48,000 fee shall be made to Dave Rogers in 24 installments of \$2,000 each " *Id* On May 28, 2003, a handwritten addendum was added to the contract extending the terms of the contract, including additional payments of \$8,000, to July 15, 2003 *Id* The contract makes no mention of the MOU or the committees' ownership interest in the list

Rogers' memory was not clear surrounding the details of the contract, however, he stated that he believed someone at BMW Lists approached him with the offer to buy the mailing list Rogers stated that he believed he spoke with Patrick Mooney and Robert Dubiel about the contract and about his ownership interest in the mailing list, but he did not remember any details of those conversations Rogers Tr at 54-57 Rogers does not recall anyone at BMW Lists

⁹ Robert Dubiel, President of BMW Lists, signed the contract on April 20, 2003, but Rogers did not sign the contract until May 31, 2003

1 questioning the legality of his ownership interest in the list at the time of the contract, but did
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3 Dubiel, who was President of BMW Lists at the time of the contract, he had questioned Patrick
4 Mooney, who was the managing partner of BMW Lists at the time, about "the legality of the
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8 According to a list of payments made to Rogers by BMW Lists, Rogers was paid \$56,000
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15 time from any other source for the sale or rental of his committees' mailing list, Rogers indicated
16 that he thought he might have but did not remember from whom or the amount Rogers Tr at
17 64-65

18 III. ANALYSIS

19 It is undisputed that David W Rogers sold a mailing list developed almost entirely by his
20 campaign committees using contributions received pursuant to the Federal Election Campaign
21 Act of 1971, as amended, ("the Act") and retained the proceeds from the sale for his own
22 personal use The Act states that a "contribution accepted by a candidate" "shall not be

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converted by any person to personal use " 2 U S C § 439a(b)(1) "A contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign " 2 U S C § 439a(b)(2) The Commission's regulations state that "the Commission will determine, on a case-by-case basis whether uses of funds in a campaign account" constitute "personal use " 11 C F R § 113 l(g)(1)(u) The regulations then state that "the transfer of a campaign committee asset is not personal use so long as the transfer is for *fair market value* " 11 C F R § 113 l(g)(3) (emphasis added)

According to documents and sworn testimony, Rogers sold his campaign committees' master mailing list to BMW Lists for at least \$56,000 in profit, which he retained for his own personal use (to pay the mortgage, his children's private school bills, and living expenses) Rogers Tr at 64-66 Furthermore, the mailing list that he sold was apparently developed by his campaign committees using contributions made to his committees ¹⁰ Christian Winthrop, on behalf of the committees, apparently consented to this transaction by signing the Memorandum of Understanding giving Rogers co-ownership rights in the list without a fair market value exchange

The fact that Rogers and Friends of Dave Rogers entered into a Memorandum of Understanding purporting to grant Rogers a co-ownership interest in the list does not change the analysis It merely makes the committees complicit in the violation of the Act's personal use

¹⁰ Mr Rogers only contributed an initial list of between 500 and 1,000 names to the development of the mailing list, which appears to have ultimately included in excess of 20,000 names Rogers Tr at 48 The Committees developed the bulk of the mailing list by purchasing lists, renting lists for direct mail purposes and adding the names of people who responded to the direct mail to the master mailing list, and using campaign volunteers to help develop the list further Rogers Tr at 39-41

1 provisions Neither the Act nor the Commission's regulations allow parties to contract around
2 the personal use provisions

3 Although it is conceivable that a candidate could enter into a contract with his principal
4 campaign committee to obtain some asset or portion of an asset belonging to his campaign
5 committee (or developed using contributions to his campaign committee) by providing
6 something of value to his committee (money, physical equipment, etc) in a fair market
7 exchange, there was no fair market exchange in this case Despite the MOU that Rogers signed
8 with his first principal campaign committee, there is no basis on which to conclude that the
9 transfer of the committee asset (the mailing list) to Rogers was made for fair market value It
10 does not appear that Rogers' committees received anything in exchange for the transfer The
11 MOU stated that the consideration was "his personal contributions to the creation of such lists,
12 his signature on all fundraising letters, and his life story " Attachment 2 Rogers' principal
13 campaign committees already had the right to use the candidate's name or likeness on a
14 fundraising solicitation In fact, Rogers agrees that it would have been impossible for him to run
15 for Congress without providing his committees with his name, likeness, and life story and admits
16 that he provided these things prior to and without any thought of claiming an ownership interest
17 in his committees' mailing list Rogers Tr at 31

18 The relatively few names Rogers initially provided to his 2002 committee in comparison
19 with the apparent size of the final list that he sold to BMW Lists, and the fact that his committees
20 spent at least \$211,648 20 to develop the mailing lists, would not seem to constitute fair market
21 value In fact, as previously stated, Rogers is not even sure if any of the names he initially
22 provided to his committees were part of the final list that he sold Rogers Tr at 52 The fact that

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General Counsel's Brief

Rogers for Congress n/k/a Special Operations Fund and
Christian Winthrop, in his official capacity as treasurer

1 he provided his committees with his name, likeness, and life story can hardly be considered
 2 providing fair market value in exchange for 100% ownership in his committees' mailing lists ¹¹
 3 In addition, Rogers' life story does not appear to have any tangible monetary value above the
 4 value of any other individual's life story, if that individual decided to run for Congress ¹² Thus,
 5 Rogers does not appear to have provided fair market value to his committees in exchange for his
 6 ownership interest in the mailing list

7 Accordingly, this Office is prepared to recommend that the Commission find probable
 8 cause to believe that Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop,
 9 in his official capacity as treasurer, violated 2 U S C § 439a and 11 C F R § 113.1

IV. GENERAL COUNSEL'S RECOMMENDATION

- 1 Find probable cause to believe that Rogers for Congress n/k/a Special Operations
 Fund and Christian Winthrop, in his official capacity as treasurer, violated 2 U S C
 § 439a and 11 C F R § 113.1

Date

12/21/2007


 Thomas P. Duncan
 General Counsel


 Kathleen Gurth
 Acting Deputy Associate General Counsel
 for Enforcement

¹¹ Rogers' committees did not report receiving any payments from BMW Lists, and the contract between BMW Lists and Rogers was for the purchase of the mailing list, not a mere rental. Also, Rogers stated that he did not share any portion of the proceeds from the sale with his committees. Rogers Tr. at 64.

¹² When asked, Rogers admitted that he has never been offered money for the rights to a book or movie utilizing his name and life story, has never attempted to sell the rights to his name and life story, and has never been compensated in any way for the use of his name and life story. Rogers Tr. at 14.

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General Counsel's Brief

Rogers for Congress w/k/a Special Operations Fund and
Christian Winthrop, in his official capacity as treasurer



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